

October 28, 2011

Mr. Allan B. Taylor, Chairman
Connecticut State Board of Education
165 Capitol Avenue - Room 301
Hartford, Connecticut 06106

Dear Mr. Taylor,

The Bureau of Special Education has submitted to the State Board of Education proposed revisions in the regulations governing special education. The Board held a hearing on these regulations on October 5 and plans to vote on them on November 2, 2011. This letter is submitted by attorneys and advocates throughout Connecticut who represent children with disabilities and their parents seeking a free appropriate public education. Although we appreciate the effort of the Bureau of Special Education, we are very concerned that certain sections of the proposed regulations are damaging to students with disabilities and are out of compliance with federal law.

The revisions to the existing regulations are purported to be an effort to bring Connecticut's administrative regulations into conformity with the federal Individuals with Disabilities Education Act (IDEA). However, in two areas – identification of students with learning disabilities and independent educational evaluation at public expense – the proposed regulations depart substantially from the requirements of the IDEA. Further, we are concerned that certain interests are pressuring the State Board to make a change in the burden of proof for special education cases, a change that would substantially curtail the rights of children with disabilities and that would conflict with plain language in Connecticut's statutes.

We stand ready to work with the State Board to make needed changes in these proposed regulations. If time does not permit such change, we recommend that the Board remand the offending sections of the proposed regulations to the Bureau of Special Education to be reworked.

1. Learning Disabilities

Concerning the identification of students with learning disabilities, the proposed regulations conflict with federal law, are internally contradictory, and would result in poorer education for the most in need students. We ask that the State Board reject Section 18 of the proposal, which rewrites RCSA § 10-76d-9.

- The proposed regulation would require that every grade in every school in every district utilize Scientific Research Based Intervention (SRBI), Connecticut's response to intervention initiative, as part of its eligibility determination for students with a suspected learning disability. The reality is that SRBI has not been implemented in all schools, where it has been implemented, the quality and integrity of the program varies widely, and the State Department of Education (SDE) has no oversight program to appraise and monitor the effectiveness of local SRBI programs. Instead of serving as a program to ensure that all students are making appropriate progress in literacy and math, SRBI is often a cumbersome paperwork exercise used as a roadblock to evaluation and identification of students with learning disabilities. The federal Office of Special Education Programs (OSEP) has recognized this problem and has issued clear guidance to forbid the exclusive use of SRBI to determine special education eligibility. The proposed regulation contradicts the OSEP guidance.
- Federal law does not require that school districts utilize SRBI to evaluate students for learning disabilities. Instead, the federal regulation (34 CFR §300.307) requires only that States give school districts the option to use SRBI as part of its initial assessment for identification of learning disabilities.
- The proposed Connecticut regulation inappropriately restricts the PPT's ability to consider all relevant information by prohibiting any consideration of a discrepancy between a child's educational achievement and intellectual ability, even when the discrepancy has already been identified. In contrast, federal law does not include this prohibition but permits states to give districts the option to consider discrepancy as part of a comprehensive evaluation.
- The proposed regulation fails to require a school board to consider a student's patterns of strengths and weaknesses in performance or achievement, which is a requirement under the federal regulation.
- The proposed regulation provides that alternative procedures must be implemented before a referral to special education is made, which contradicts the federal Child Find requirements in the IDEA. The federal regulation provides that alternative procedures may be implemented prior to or as part of an initial evaluation.
- The proposed regulation indicates, in some places, that a child's response or lack of response to SRBI determines whether a child has a learning disability, although elsewhere there is contradictory language. The federal regulation is clear that response to intervention is only one component of a comprehensive evaluation.

2. Independent Educational Evaluations

One of the most critical parental right under the IDEA is the right to secure an independent educational evaluation (IEE) at public expense when the parent disagrees with the evaluation conducted by the school district. Current Connecticut special education regulations include provisions for IEEs at RCSA § 10-76d-9 (c). Surprisingly, the proposed regulations do not.

This is an area that calls out for more state regulation, not less. Recently, numerous school districts have published IEE guidelines that purport to set far more restrictive limits on IEEs than are permitted under federal law. Unauthorized limitations contained in these guidelines include:

- Inappropriately restricting IEEs only to the subject matter covered in the district's evaluation—even when the district has failed to comply with the statute and evaluate the student in all areas of suspected disability.
- Establishing criteria for independent evaluators that are more restrictive than the criteria the district actually uses for its own evaluations.
- Requiring that evaluators have particular certifications and licensures that are not necessary and that are designed to exclude certain qualified evaluators whom the District does not like.
- Setting arbitrary geographic limitations on the use of evaluators.
- Micromanaging the work to be performed by the evaluator.
- Requiring the evaluator to review his or her results with school district personnel before finalizing a report.

The federal regulations provide no authority for states or districts to develop unique IEE guidelines. Instead, at 300.502(a)(3)(i), the federal regulations define an independent educational evaluation as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. Further, the federal regulation, at 300.502(e)(1), is explicit that “the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent education evaluation.” Paragraph (e)(2) further prescribes, “Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.”

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The Connecticut State Department of Education has an affirmative obligation to ensure compliance by local school districts with the IDEA requirements. In light of the recent history of over-aggressiveness by Connecticut school districts in restricting a parent's right to an IEE, the proposed regulations should contain a strong restatement of the federal regulation in IEEs.

3. Other Significant Concerns

The proposed regulations provide elaboration of Connecticut's restraint and seclusion law, yet do so in a selective manner. The result is that the proposed regulations imply there is more room to use aversives in Connecticut schools than the legislature intended.

The regulations establish a whole new framework of limitations concerning the provision of homebound instruction to children who cannot attend school due to medical or emotional reasons. The regulations provide broad and unchecked power for school districts to override the professional opinion of private medical providers and thereby refuse to provide a sick child with needed education.

The regulations fail to incorporate Connecticut's bullying law into the special education framework. Children with disabilities are disproportionately bullied and are also disproportionately bullies. These regulations should cover the subject.

The regulations stretch out the timelines for evaluations and can result in extensive delays between referral and the provision of services.

4. Burden of Proof

Local school boards and municipalities have pressed the State Board of Education to amend the regulations to switch the burden of proof from the school boards to parents concerning the appropriateness of the school's educational program for a child. We believe there is no justification whatsoever for changing the burden of proof. Notwithstanding that position, it is clear, through its passage of Special Act 11-9, the legislature has determined that it is the appropriate body to deal with the issue of the burden of proof. The State Board of Education would far exceed its jurisdiction to act on the burden of proof now.

The Burden of Proof, and who should bear it in special education Due Process Hearings in Connecticut, has been much misunderstood. It does not help that CAGE has chosen to mislead and misrepresent the law on the subject in a lengthy plea that bears little resemblance to the law or reality. So that the State Board of Education is not confused by CAGE's inaccurate statement, we feel it important to discuss the issue.

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Contrary to the CABE testimony, there is nothing in the United States Supreme Court Decision of *Schaeffer v. Weast*, 546 U.S. 49 (2005) which overturns, prohibits, or in any way precludes Connecticut from continuing to assign to school districts the burden of proving that the school district has offered the disabled child a free appropriate public education. What *Schaeffer* said was, where the State fails to allocate the burden of proof, the default rule is that the party who brings an action bears the burden of proving the case. It is one of those matters where the IDEA is silent on a subject and leaves it to the States to decide. Connecticut has allocated the burden on the school district.

Connecticut made the decision to allocate the burden of proving the appropriateness of the program offered for the reasons articulated by Justice Ginsberg in her dissent from the *Schaeffer* decision. She said:

The proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy. Familiar with the full range of education facilities in the area, and informed by "their experiences with other, similarly-disabled children, the school district is ... in a far better position to demonstrate that it has fulfilled [its statutory] obligation than the disabled student's parents are in to show that the school district has failed to do so." "In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents." In view of the school district's "better access to relevant information," parent's obligation "should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory schemes.

546 U.S. 49, 64-65 [Citations Omitted.]

The State Department of Education owes the General Assembly a report on the costs associated with allocating the burden of proof to the school district. In light of the fact that very few cases actually go to a full evidentiary hearing, based on the Department's own data, we cannot conceive of any significant added cost of assigning the burden to the school district. Notwithstanding that fact, this is an issue to be addressed another day and not in the proposed regulations.

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These comments are in extremely summary form. We would be delighted to provide extensive background material on each point made in this document. We ask you to remand the sections of the proposed regulations that run afoul of federal law to the Bureau of Special Education to rework consistent with federal law.

Sincerely yours,

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cc. Commissioner Stefan Pryor